

74

12

P. Watt

FEBRUARY 13. 1771.

14th Febry 1771

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F
WILLIAM WATT, Merchant in AIRTH,

Humbly sheweth,

THAT the petitioner, in 1767, took a lease for three nineteen years and a lifetime, from William Murray of Polmaise Esq; of several farms in the Kerse of Polmaise.

Of these, one called Dykes was possessed by John Wordie, in virtue of a lease which did not expire till the 1772, five years after the petitioner's entry to the rest.

As the petitioner paid a considerable higher rent, Wordie agreed to let him have possession of his farm; at the same time, he was to get into the other farms, on the petitioner's paying him, for the years to run of his tack, the same rent he was afterwards liable to pay to the master, being 1 l. 5 s. per acre. But as Wordie was thirled to the master's miln, and liable for a very high duty thereat, repair the dams, &c. and likewise to pay victual rent, it was settled and agreed, that the petitioner should perform and deliver

A

all

elec
24th March 1771
alter
advocate
cause submit
defence &
assistie

all these, and have allowance therefor out of the aggregate money-rent.

Sept. 2.
1767.

In terms of this agreement, Wordie and the petitioner interchanged missives: That from Wordie to the petitioner was as follows: " Sir, I received your letter of this date, and I hereby agree to accept of your offer of 1*l.* 5*s.* Sterling, *per* Scots acre, for each acre of the lands in Wester Dykes of Polmaise, presently possessed by me, according to my tack, for each year during the currency of the same, which has yet five years to run, and expires in the year 1772, according to the last mensuration made of said lands by Mr Sconce, on condition, that you pay to Mr Murray of Polmaise yearly, during the currency of the said five years, the whole money-rent, meal and bear thirlage, multure, as formerly in use to be paid, conform to said tack, at the Kerse milns, with the kain-hens, capons, cefs, carriage of coals, and other prestations and burdens therein mentioned: And upon your producing yearly to me, Mr Murray of Polmaise, or his factor's discharges, for the money and victual-rent, and thirlage, multure, kain, cefs, carriage of coals, and other prestations therein-mentioned, you shall have yearly deduction for the amount of the same, out of the rent you pay to me, being 46*l.* 5*s.* Sterling; and you shall be allowed yearly by me the same price for the meal and bear that Mr Murray gets for his farms: and I hereby agree, that this bargain shall be extended upon stamp-paper, and an assignation of my said tack granted to you as soon as you please; you finding me sufficient security for payment of my rent, after deducting what you pay yearly, as above-mentioned, to Mr Murray of Polmaise, upon my account. I am, &c."

In order to extend this bargain upon stamp-paper, as the above missive bears, that missive, with the one from the petitioner to Mr Wordie, were put into the hands of
Mr

Mr Wilson factor for Polmaise, without any other direction whatever from either party, than to follow exactly the tenor of the missives.

Mr Wilson thought it was better to execute a sub-tack than an assignation; and in writing out this sub-tack, which was executed in December 1767, in enumerating the various services to be performed by the petitioner, and for which deduction was to be given him from the rent of 1 *l.* 5 *s.* per acre, he committed several oversights, of which the most capital was, that he only stipulated an allowance to the petitioner for the multures of the farm-meal, but not of the whole crop, as was conditioned in the missives.

The multiplicity of articles in the tack hindered the petitioner from adverting to this mistake, and he signed it, on the firm belief that it corresponded exactly to the missives; however, at the very first settlement, the mistake was discovered, acknowledged, and rectified: Wordie gave allowance for the whole multure, in terms of the agreement, and a docquetted accompt was signed by the petitioner's brother to that effect, acknowledging his having got allowance for said deduction; and of the same date, Wordie granted the petitioner an ample discharge.

June 5.
1769.

That this notwithstanding, the said John Wordie, and John Campbell, writer in Stirling, as his factor, brought a process before the Commissary of Stirling, against the petitioner for repetition of 5 *l.* 12 *s.* 3 $\frac{3}{4}$ *d.* said to be overcharged on multures which the pursuer was not obliged to allow. *Item*, 3 *l.* Sterling for statute-work, which the pursuer was likewise not obliged to allow: *Item*, 13 *s.* 4 *d.* for two new locks to the barn, these left by the pursuer being insufficient; on account of none of which he pretended the petitioner had any title to a deduction, except for the price of fifteen pecks of multure for the farm-meal. The libel also concluded for 2 *l.* 14 *s.* for plowing three acres of the
fore said

foresaid farm three times over, before the petitioner's entry, amounting in whole these sums to 12*l.* 3*s.* 7*d.* deducting 12*s.* 6*d.* for the aforesaid fifteen pecks of multure for the farm-meal, with the interest of the balance from the date of the citation.

The petitioner's defence was, that every article the petitioner craved, and got allowance of at the accompting above-mentioned, was agreeable to their bargain; that the rent the petitioner agreed for was 25 *s.* *per* acre, and all the petitioner got was deduction of what he paid by services; for further than that sum he was nor could not be liable: and with regard to the locks, that they were wanted at the pursuer's removal; and as to the plowing, that it was included in the bargain he made with the pursuer, and no claim could lie therefor, as the fallowing was over before the bargain was made.

Dec. 1. 1769. Answers were made to these defences; and, of this date, the Commissary was pleased to pronounce the following interlocutor: " Finds the pursuer intitled to re-
 ' petition of any sums he credited the defender with by
 ' fitted accompt in process, beyond what he is intitled to
 ' by the sub-tack libelled on; and that the sub-tack must
 ' be the rule of decision betwixt the parties, as being of
 ' a date posterior to the missive pled on by the defender:
 ' Finds, that by the said sub-tack the defender and cautioner are bound to relieve the pursuer, John Wordie, of
 ' all stents, taxations, and other public burdens, and impositions whatever; and that, therefore, the defender
 ' hath no title to the credit taken for the statute-work,
 ' nor to the multure taken credit for in the said fitted accompt, except the multure of the farm-meal, and kiln
 ' dues: Finds the pursuer is not intitled to repetition of
 ' 13*s.* 4*d.* taken credit for in said accompt, for casting
 ' the miln-lead, as the tack warrants that credit: Finds,
 ' that the article charged for plowing, the same being
 ' performed

‘ performed before the parties agreed upon the sub-set,
 ‘ will fall under that agreement, unless the pursuer prove
 ‘ a separate paction thereanent; as to which allows him
 ‘ a proof: Appoints the defender, Watt, to say, by a wri-
 ‘ ting under his hand, whether or not the locks he put
 ‘ upon the barn were absolutely necessary, and what is
 ‘ the amount of the multure and kiln-dues of the farm-
 ‘ meal.” And to this interlocutor the Commissary adhered, upon advising a reclaiming petition, with answers, replies, and duplies, with this variation, that he allowed a proof of an agreement anent the fallowing, as alledged by the pursuer, and the rate of payment: And, upon a second reclaiming petition, the Commissary still adhered.

Upon this the petitioner obtained an advocacy, which came in course before Lord Pitfour, Ordinary; but his Lordship was, of this date, pleased to pronounce the following interlocutor: “ Finds the sub-tack is the rule of Aug. 4.
1770.

‘ accompting, and therefore remits the cause *simpliciter*.” And, upon a representation and answers, his Lordship was pleased to adhere. Of which judgments the petitioner must crave a review; as, if the pursuer prevail, instead of his paying 1 l. 5 s. per acre, the rate agreed, he will pay at the rate of 1 l. 9 s. and he is hopeful your Lordships will have no difficulty to find, that the pursuer’s process, so far as it concludes for repetition of 5 l. 12 s. 3 $\frac{3}{4}$ d. Sterling, alledged to be over-charged on multures, ought not to be sustained. Jan. 29.
1771.

That the petitioner was to have deduction for the multures of the whole crop, is expressly settled by the missives.

In the sub-tack, indeed, when the deductions are enumerated, the multures for the farm-meal are only taken notice of; but this, it is evident, was a mere mistake: For

The pursuer does not dispute, that the missive letters were the only directions given to Mr Wilson for writing out the sub-tack, nor does he alledge that any other a-

greement was entered into betwixt him and the petitioner, than that contained in the missives, or that any alteration of, or deviation from the terms specified in these missives was made before carrying them into execution by the sub-tack; nay, he, in very plain terms, in his answers to the petitioner's representation, acknowledges he believes the petitioner was in a mistake so far when he signed the sub-tack. His words are: " It is in vain for the representer to say, that the respondent must prove an alteration or deviation from the letter; for his answer is obvious, he has nothing to do with the letter: He is not bound so much as to open his mouth concerning it: The tack is the only evidence of the bargain, to which either your Lordships or he now can have recourse; and, if the defender pretends a deviation from the lease, he must prove it by a posterior writing; Another answer might be, that the tack is *probatio probata* of the deviation; and it is impossible for the defender to prove the contrary, either in law or common sense; for supposing that he signed it in a mistake, that must depend upon his own assertion alone: The pursuer had no reason to object to his being in earnest, or to reject the conditions proffered to him in the lease; and it would be impossible for the defender to avail himself of any thing the pursuer could say; for supposing him to go all the lengths the defender could desire, it could only be, that possibly the defender might have been in a mistake; but that being only an oath of credulity, as to the actions of another man, could never affect the just, legal, and solid right, which the pursuer had acquired by the sub-tack."

But this the petitioner takes to be very inconclusive reasoning: Supposing the accompt settled posterior to the sub-tack out of the question, the petitioner imagines, that, as the pursuer admits, no other directions were given for writing that sub-tack but the missives, and that

no

no alteration of, or deviation from them had been intended or communion upon between the parties; the mistake in the sub-tack would have been sufficiently instructed: But after that the pursuer himself has acknowledged the mistake by a posterior writing, viz. the docquetted accompt and discharge above-mentioned, and by giving a deduction of the multures of the whole crop, the petitioner, with submission, cannot think there is any plausibility in the pursuer's demand; for supposing that the docquetted accompt and discharge had not been granted, and that in strict law the pursuer might have stuck by the tack, notwithstanding the obvious mistake which occasioned its disconformity to the missive, yet still it is certain that he was bound in good conscience to have rectified the mistake; and therefore, since he has done so by giving deduction for the multures of the whole crop, it is clear that this process should be dismissed; because it is *triti juris*, that no *condictio indebiti* lies for repetition of that *quod naturaliter debetur*.

The pursuer's great argument was, that the sub-tack presumed an alteration of the original agreement; but *presumptio cedit veritati*: and that the truth is, that the omission in the tack was owing to pure mistake, is put out of all doubt, by the pursuer's not pretending that any other direction than the missives were given to the writer of the sub-tack, or that any the least alteration of, or deviation from the missives, was intended by the parties, and by the pursuer, at the first accompting, afterwards giving deduction of the multures for the whole crop, as appears from the docquetted accompt above-mentioned.

May it therefore please your Lordships, to review the Lord Ordinary's interlocutors, and to find that the present action for repetition, as to the multures, is groundless; and therefore to remit to the Commissary to alter his interlocutor as to that point, or to advocate the cause, and assoilzie therefrom.

According to justice, &c.

JO. MACLAURIN